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No. 77-771

In the
# Supreme Court of the United States

OCTOBER TERM, 1977

DAVID L. SCHURGIN,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# INDEX


PAGE

OPINION BELOW ..... 1

JURISDICTION ..... 2

QUESTIONS PRESENTED FOR REVIEW ..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

The Court Of Appeals Has Sanctioned A Proceeding In The Lower Court Which So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision. ..... 7

The Opinion Of The Court Of Appeals In This Case Conflicts With The Decisions Of Other Courts Of Appeals And With Prior Decisions Of The Sixth Circuit On The Subject Of Interstate Commerce. ..... 10

In Rejecting Petitioner's Argument That The Government Impermissibly Amended The Indictment, The Court Of Appeals Has Decided A Federal Question In A Way Which Conflicts With The Applicable Decisions Of This Court. ..... 13

In Summarily Dismissing Petitioner's Argument That He Consented To The Search Of His Business Premises Only As A Result Of Coercion And Duress, The Court Of Appeals Has Decided A Federal Question In A Way Which Conflicts Not Only With The Applicable Decisions Of This Court But Also With The Decisions Of Other Courts Of Appeals On The Same Matter. ..... 17

PAGE

CONCLUSION ..... 21

CERTIFICATE OF SERVICE ..... 23

APPENDIX:

A. Opinion of the Sixth Circuit Court of Appeals. ..... 1a

B. Excerpt from the Proceedings Had in the United States District Court for the Eastern District of Michigan in the Matter of the United States, plaintiff, v. David L. Schurgin, defendant. ..... 6a

C. Statutes ..... 12a

TABLE OF AUTHORITIES

CASES:

*Amos* v. *United States*, 255 U.S. 313 (1921) ..... 18

*Ex parte Bain*, 121 U.S. 1 (1886) .....13, 14, 17

*Bruton* v. *United States*, 391 U.S. 123 (1968) .....3, 9

*Higgins* v. *United States*, 209 F.2d 819 (D.C. Cir. 1954) .....18, 19

*Judd* v. *United States*, 190 F.2d 649 (D.C. Cir. 1951) .....18, 19

*Kirvelaitis* v. *Gray*, 513 F.2d 213 (6th Cir. 1975) .....18, 20

*O'Kelley* v. *United States*, 116 F.2d 966 (8th Cir. 1941) .....10, 11

*Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) ....17, 20

*Stirone* v. *United States*, 361 U.S. 212 (1960) .....13, 14, 15, 17

*United States* v. *Cousins*, 427 F.2d 382 (9th Cir. 1970) .....10, 11, 12



PAGE

CASES:

*United States* v. *Yoppolo*, 435 F.2d 625 (6th Cir. 1970) ..... 10

*Winer* v. *United States*, 228 F.2d 944 (6th Cir. 1956) .....10, 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V ..... 2

U.S. Const. amend. IV ..... 3

18 U.S.C. § 659 ..... 12a

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***No.***

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DAVID L. SCHURGIN,

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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Petitioner David L. Schurgin respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 27, 1977.

## OPINIONS BELOW

The opinion of the court of appeals, reported at 558 F.2d 1271, appears in appendix A attached hereto. The United States District Court for the Eastern District of Michigan, Southern Division, published no opinion but delivered its findings of fact and conclusions of law from the bench at the conclusion of the trial. The portion of the record containing these findings and conclusions appears in appendix B attached hereto.

## JURISDICTION

The Court of Appeals for the Sixth Circuit entered its opinion and judgment on July 27, 1977. The court of appeals denied a petition for rehearing and suggestion of rehearing in banc on November 4, 1977.

Petitioner invokes the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1254.

## QUESTIONS PRESENTED FOR REVIEW

Did the confusion resulting from the decision of the district court to preside over the simultaneous prosecution of four separate trials before two juries and the bench deprive the petitioner of due process of law in violation of the fifth amendment?

Did the district court err in finding that the goods when stolen were still travelling in interstate commerce?

Did the prosecutor by his conduct of the trial impermissibly amend the superseding indictment and in so amending abrogate the jurisdiction of the trial court?

Did the district court err in finding that the agents of the Federal Bureau of Investigation in no way coerced the petitioner, but that the petitioner knowingly and unequivocally consented to their search of his business premises?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . , nor be deprived of life, liberty, or property, without due process of law; . . .



U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 659

The provisions of this statute appear as appendix C.

## STATEMENT OF THE CASE

In a superseding indictment the grand jury charged the petitioner with theft and possession of goods stolen while travelling in interstate commerce. Specifically, count I of the indictment charged the petitioner and his co-defendants Rimar, Chila, Witherite and Barber with stealing, and aiding and abetting in stealing, from a storage facility, chattels which were moving as part of an interstate shipment of freight from Chicago, Illinois to Dearborn, Michigan, all in violation of 18 U.S.C. §§ 2 and 659. Count II charged petitioner and defendants Rimar and Chila with knowing possession of 2880 York automotive air compressors which had been embezzled and stolen while moving as part of an interstate shipment of freight from Chicago, Illinois to Dearborn, Michigan, the defendants then knowing said chattels to have been stolen in violation of 18 U.S.C. § 659. The district court obtained jurisdiction of the offense pursuant to 18 U.S.C. § 3231.

Referring to the decision of this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968), the district court severed the trials of petitioner and defendants Barber

and Rimar from the trial of defendant Chila. Because of a conflict in trial strategy, the district court also severed the trial of petitioner from the trial of defendant Rimar. Having thus severed the trials of these four defendants, the district court nevertheless determined to permit the simultaneous prosecution of all four defendants. Petitioner and defendant Barber having waived their right to trial by jury, the court empanelled two juries to try the cases of defendants Rimar and Chila respectively. Thus, the court determined to sit as trier of fact in the bench trials of petitioner and defendant Barber while at the same time presiding over the jury trials of defendants Rimar and Chila. (Lloyd Witherite, named as a defendant in count I of the superseding indictment, pled guilty prior to trial.)

Thereafter, at the beginning of the trials, the government dismissed count I of the indictment as to the petitioner. Count I of the indictment originally charged petitioner Schurgin, defendant Barber, and their co-defendants Rimar, Chila, and Witherite with the theft of 2880 York automotive compressors. With the dismissal of count I as to petitioner (and the plea of guilty by Witherite), count I charged only defendants Barber, Chila and Rimar with the theft. Count II, on the other hand, charged only petitioner and defendants Rimar and Chila with having had possession of the stolen compressors. Count II did not charge defendant Barber. In dismissing count I as to petitioner, the government in fact severed the trial of petitioner, now charged only in count II, from the trial of defendant Barber, charged only in count I. Thus, the district court in fact presided over the simultaneous prosecution of four separate trials, sitting as trier of fact in the two separate bench trials of the petitioner and defendant Barber and trier of law



in the two separate jury trials of defendants Rimar and Chila.

At trial the government presented evidence that Ernest Williams, a truck driver for Shippers Dispatch, drove a trailer from the Shippers Dispatch freight yard in Detroit, Michigan, to the Ford River Rouge complex in Dearborn, Michigan on April 16, 1974. Williams took with him a pro bill showing that the trailer contained eighteen pallets of air conditioning units shipped from the Ford Motor Company in Chicago, Illinois, to the Ford assembly plant in Dearborn, Michigan. On his arrival at the plant, Williams delivered the pro bill to Ford's clerk who directed him to leave the trailer in the bull pen, an area inside the complex where Ford stored trailers until ready to unload them. Ford employees exercised full control over trailers stored in the bull pen, from time to time entering them to remove material required on the production line. When space became available at the loading dock, the Ford employees would direct a switcher to bring the trailer to the dock. (A switcher is a driver employed by an independent trucking firm who works within the Ford complex at the direction of Ford employees.)

The testimony heard in petitioner's trial established only that Lloyd Witherite, a switcher at the River Rouge complex, subsequently drove the Shippers Dispatch trailer out of the compound, leaving it in a parking lot outside the complex and notifying defendant Rimar of its location. Fred Howard, the owner of a scrap and salvage company, testified that on April 17, 1974, at about six o'clock in the morning, Rimar with the help of Howard and his employees removed a load of large heavy pallets from a trailer which Rimar brought into the yard and

loaded them into another trailer which one of Rimar's employees drove up to the dock.

The compressors, now loaded in the trailer to which Rimar had transferred them in Howard's yard, arrived at the petitioner's place of business, OEM, later in the morning of April 17, 1974. Petitioner testified that he had purchased the compressors from one Tony Donegan at a cost of twenty-four dollars apiece. Thus, petitioner's testimony established that he lawfully had the compressors in his warehouse when agents of the Federal Bureau of Investigation arrived almost a month later on May 14, 1974.

Four FBI agents went to petitioner's place of business, OEM, in the afternoon of May 14, 1974. Arriving at about four o'clock, the agents remained outside for about an hour. At closing time, about five o'clock, two of the agents entered OEM, and identified themselves to petitioner, informing him that they were investigating the theft of certain air compressors which they had reason to believe had been delivered to OEM. At 5:30 p.m., half an hour after their arrival, the agents advised petitioner of his rights, the agents' log showing that petitioner signed the advice of rights form at 5:31 p.m. After signing the form, petitioner left to call his attorney, returning about five minutes later.

At their request, petitioner then took the agents on a brief tour of the plant. Since the agents had no search warrant, they now requested that petitioner sign a form consenting to their search of OEM. The agents pressed petitioner to consent to their search, repeatedly asserting that they knew he had stolen compressors which he had bought from Dale Rimar. As petitioner signed the consent form, one of the agents remarked that petitioner was wise



to consent "because we know you bought them from Dale Rimar." Without giving the form to the agents, petitioner left to call his attorney who advised him only to do whatever he wished. While petitioner telephoned, the other two agents entered the building. With four agents present, the first two continued to press for petitioner's consent. A half an hour later, thoroughly frightened and intimidated, petitioner finally gave the form to the agents. Although petitioner offered to show them the location of the compressors, the agents then searched the warehouse themselves, finding both compressors and serial plates. The agents pointed out to petitioner the numbers on their list of stolen parts which coincided with the numbers on these serial plates. One of the agents testified that the petitioner then told him that, "he [the petitioner] bought those [the compressors] in good faith, that he knew where they came from and did not know that they were stolen when he bought them." When petitioner's attorney later arrived, petitioner in the presence of his attorney informed the agents that he had bought the compressors from one Tony Donegan who had advised him that the compressors were a manufacturer's overrun. Petitioner told the agents that he had paid twenty-four dollars apiece for the 2880 compressors.

## REASONS FOR GRANTING THE WRIT

### THE COURT OF APPEALS HAS SANCTIONED A PROCEEDING IN THE LOWER COURT WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The fifth amendment provides that "no person shall . . . be deprived of life, liberty or property without due process of law." Fundamental to this guarantee of due

process of law is the right of the criminal defendant to a fair and impartial trial. The overwhelming confusion which resulted from the attempt to conduct the four separate trials of the petitioner and his three co-defendants simultaneously made the fair and impartial trial of the charge against petitioner impossible, thereby depriving him of due process of law. For this reason, petitioner respectfully requests that this Court grant this petition on the grounds that the decision of the Sixth Circuit Court of Appeals sanctions such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Although the trial court severed the trials of defendants Rimar, Chila and Schurgin each from the other, the defendants were in fact tried in a single proceeding with the same judge presiding over the jury trials of defendants Chila and Rimar and in the bench trials of defendants Schurgin and Barber. As the trials proceeded with the juries shuttling in and out, expediency rather than logic often determined the order of testimony. Confusion frequently arose as to which testimony pertained to which proceeding, which jury sat in which matter and which attorney represented which defendant.

Furthermore, in dismissing count I as to the petitioner, the government had also severed the trial of petitioner, now charged only in count II of the indictment, from the trial of defendant Barber, charged only in count I of the indictment. Thus, the district court as trier of fact in the bench trial of petitioner had not only to confront the general confusion inherent in the proceeding, but having heard the evidence in four separate trials, had also to distinguish and disregard that testimony admitted in any one of three other trials but inadmissible



in the fourth. The sheer volume of testimony, including the irrelevant and inadmissible material, combined with the illogical pattern of presentation, rendered impossible the juxtaposition of testimony necessary to establish a coherent statement of facts in petitioner's trial.

The opinion of the court of appeals itself evidences the impossibility of establishing a coherent statement of facts in any one of the trials. In its extensive exposition of the facts, the court of appeals inextricably interweaves facts elicited in the course of four separate trials, including in its recitation testimony both admissible and inadmissible as to any given defendant. Thus, the opinion of the court of appeals perpetuates the confusion on the part of the district court, confusion which culminated in the judgment of the district court, for on June 11, 1976, that court found the petitioner, who had been tried only on one count, guilty on two counts, a finding possible only if the Court considered testimony not properly admitted into evidence in petitioner's trial.

This Court in *Bruton* v. *United States,* 391 U.S. 123, 135 (1968), found that: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." For these same reasons, this Court cannot in the present case ignore the practical and human limitations of the district court. The judgment of guilty in the petitioner's trial resulted not from a separate fair and orderly trial of the petitioner, but from a confused and complex joint proceeding, a proceeding which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

**THE OPINION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT ON THE SUBJECT OF INTERSTATE COMMERCE.**

The court of appeals ruled that under the factual circumstances of this case the alleged theft occurred in interstate commerce. Petitioner respectfully submits that, in its opinion, the court of appeals either applied the wrong standard to the facts or misapplied that standard. Two other courts of appeals, the Eighth Circuit and the Ninth Circuit, have decided cases with similar factual situations using a standard which, if applied consistently to the facts in the instant case, would have required a finding that the theft was not from interstate commerce, *United States* v. *Cousins*, 427 F.2d 382 (9th Cir. 1970); *O'Kelley* v. *United States*, 116 F.2d 966 (8th Cir. 1941). Furthermore, prior decisions of the Sixth Circuit in *Winer* v. *United States*, 228 F.2d 944 (6th Cir. 1955) and *United States* v. *Yoppolo*, 435 F.2d 625 (6th Cir. 1970), are in accord with the decisions of the Eighth and Ninth Circuits. As a result, the opinion in this case creates a conflict between the circuits over an important question of federal law which has not been, but should be, settled by this Court.

The Sixth Circuit in *Yoppolo* correctly stated the general rule that "an interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered." 435 F.2d at 626. *See also Winer, supra*, 228 F.2d at 947. In *Winer*, the Sixth Circuit explained its position with regard to "arrival" and "delivery" under this rule and showed that it was in agreement with the standard in the Eighth Circuit by stating:



> [In *O'Kelley*] a shipment, at destination, was delivered and accepted by the consignee, who broke the seal and unloaded part of the shipment. He then locked the car with his own padlock and thereafter, it was broken into and the balance of the shipment stolen. It was held that the shipment at the time of the theft was not a part of interstate commerce; but this holding was based on the grounds that the consignee had accepted and assumed full dominion over the property, which constitutes a final and complete delivery; and that *controlling consideration* is not present in the case before us [in *Winer*].

228 F.2d at 948 (emphasis added).

As stated by the Sixth Circuit in *Winer*, the rule in the Eighth Circuit is that the passing of dominion and control over the goods to the consignee is the controlling consideration under the factual circumstances of this case in determining when the goods leave interstate commerce. In *O'Kelley*, the court stated:

> It must be borne in mind that this entire carload of goods was consigned to the Howe Wholesale Company, at Ravana, Arkansas, and when it accepted the car, broke the seal, removed part of its contents, and placed its private padlock on the door, the carrier no longer had possession but had surrendered dominion over the property to the consignee, and the consignee in turn had accepted and assumed full dominion and control over the property. This, we think, is a final and complete delivery. It was no longer a subject of interstate commerce.

116 F.2d at 967-68.

The Ninth Circuit case of *United States* v. *Cousins*, 427 F.2d 382 (9th Cir. 1970), again emphasized the importance of dominion and control in determining whether interstate commerce had ceased. In *Cousins* the court stated:

> The determination of whether a shipment is in interstate commerce at a given time is essentially a practical one, depending upon the relationship between the consignee, consignor, and carrier, the indicia of interstate commerce at the time the theft occurs, and the preservation of the congressional intent.

427 F.2d at 385. The court, in applying this standard, emphasized the fact that the theft had occurred before the consignee accepted the shipment and at a time when the railroad car was under the dominion and control of the common carrier. For these reasons it concluded that the theft was from interstate commerce. A fair reading in this case implies that if the consignee had accepted and assumed dominion and control over the shipment, the result would have been different.

The prevailing rule in the Eighth and Ninth Circuits and the rule in the Sixth Circuit until the decision in this case is that if the consignee had accepted and assumed dominion and control over the goods at the time of the theft, the theft would not be from interstate commerce. Under the Sixth Circuit opinion in this case, however, a case in which dominion and control over the goods had passed to the consignee, the court found that there was interstate commerce.

A brief recitation of the undisputed facts developed at trial serves to show that in this case the consignee, Ford Motor Company, had accepted and assumed dominion and control over the goods. At the time of the theft the goods belonging to Ford were located on Ford property, not propertly belonging to the common carrier; Ford had checked that property in through its front gate; Ford had the right, which it frequently exercised, to remove the goods from the trucks so stored on its property; the interstate carrier could not, without Ford's



permission, remove any of the goods; Ford maintained a fence and guard to prevent removal of its property; Ford did in fact use the Dearborn police in aid of its efforts to protect its property; Ford directed the movement of the goods once they were stored on Ford property; and the trucks in which the goods were stored were not sealed with a padlock by the carrier but remained at all times accessible to Ford employees and inaccessible to the employees of the carrier.

Ford had accepted and assumed dominion and control over the goods prior to the time of the alleged theft. Under the standards of *Winer, O'Kelley* and *Cousins,* the court should have found that the theft was not from interstate commerce. The decision of the court of appeals in this case, if allowed to stand, would place the rule in the Sixth Circuit in irreconcilable conflict with the rule in the Eighth and Ninth Circuits and in conflict with the prior decisions of the Sixth Circuit, all of which recognize the central importance of dominion and control to the concept of interstate commerce. Petitioner therefore respectfully requests that the Supreme Court grant this Petition for Writ of Certiorari to decide this important question of federal law and resolve this conflict.

**IN REJECTING PETITIONER'S ARGUMENT THAT THE GOVERNMENT IMPERMISSIBLY AMENDED THE INDICTMENT, THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.**

In *Ex parte Bain,* 121 U.S. 1 (1886), this Court established that neither the prosecutor nor the court may amend the indictment which a grand jury has returned against a defendant. In *Stirone* v. *United States,* 361 U.S. 212 (1960), this Court recognized that a prosecutor

may effect an amendment of an indictment by adducing proof at trial which varies significantly from the allegations of the indictment. In the present case, the court of appeals dismissed petitioner's contention that the government impermissibly amended the indictment in the course of the trial by offering evidence not of the single possession charged in the indictment, but rather of two separate and distinct possessions, one relating only to the possession by defendants Chila and Rimar and one relating to the possession of the petitioner at a different time and at a different place. In rejecting petitioner's argument, the court of appeals has decided a federal question in a way which conflicts with the applicable decisions of this Court.

Referring to the common law, but relying on the fifth amendment, this Court in *Ex parte Bain,* 121 U.S. 1 (1886), held that the requirement that a defendant be held to answer only on an indictment of a grand jury, prohibited amendment of an indictment by either a court or a prosecutor. The Court found that amendment of the indictment deprived the trial court of jurisdiction, "for the power of the Court is as much arrested [by amendment] as if the indictment had been dismissed or a *nolle prosequi* had been entered." 121 U.S. at 13.

In *Ex parte Bain,* the trial court had formally amended the indictment by striking three words from the text. In *Stirone* v. *United States,* 361 U.S. 212 (1960), this Court recognized that a prosecutor may amend an indictment by adducing proof which varies significantly from the allegations of the indictment. In *Stirone,* the grand jury had indicted the defendant under 18 U.S.C. § 1951 for interfering by means of extortion with the interstate importation of sand. At trial the prosecutor produced proof that the defendant had also interfered with the



interstate exportation of steel. The trial court then charged the jury that a finding of either the importation or exportation would establish the interstate element of the offense. Although the trial court had not permitted formal amendment of the indictment, this Court nevertheless held that the trial court had permitted improper amendment at trial. Relying, as in *Bain,* on the fifth amendment, the Court found that:

> While there was a variation in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

361 U.S. at 218. Thus, the possibility that the conviction of the defendant rested on a charge which the grand jury had not returned gave rise to fatal error.

In the present case, the indictment charged in pertinent part that:

> On or about the 17th day of April, 1974, in the Eastern District of Michigan, DAVID SCHURGIN, STANLEY RIMAR, a/k/a Dale Rimar, and JOHN JAMES CHILA, knowingly did have in their possession chattels of a value in excess of one hundred dollars ($100.00), that is, approximately 2,880 York automotive compressors, . . . in violation of Section 659, Title 18, United States Code.

Thus, the indictment charged a single possession in a single count. At trial, however, the government instead sought to and did establish two separate and distinct possessions, one involving only the defendants Chila and Rimar and one involving only the petitioner.

Throughout the course of the trials, the prosecution, the defense, and the court distinguished the separate possession of defendants Rimar and Chila from the separate possession of petitioner. Defense counsel repeatedly raised the relevancy of the possession of Rimar to the possession of petitioner or, in the alternative, the relevancy of the possession of petitioner to the possession of Rimar. The prosecution in its remarks also continually distinguished between the possession of petitioner and the possession of Rimar, a distinction which the district court did not correct but perpetuated in its own comments.

The closing statement of the prosecution before the Rimar jury clearly evidences the distinction which the prosecution in fact drew throughout the course of the trials between the possession of petitioner and the possession of Rimar.

> Before I move on, at this particular point Mr. Rimar is charged in Count Two with possession of stolen goods. . . .
>
> . . . .
>
> Under either theory it is the Government's contention Mr. Rimar had either actual and/or constructive possession of these goods. It could be said he had constructive possession of the goods when he had Mr. Witherite take them out of the Ford Motor Company Plant or it could be said he had actual possession of them when he had them at Mr. Howard's place of business and was transferring the pallets from one place to another.

The law identifies two types of possession, actual possession, defined as direct physical control over a thing at a given time, and constructive possession, defined as the power and intention, at any given time, to exercise dominion and control over a thing. The government sought to prove, and did in fact prove, that defendants



Chila and Rimar together possessed the goods at one point on April 17, 1974, when they transported the goods in the truck and transferred them at the scrap yard, thereby exercising dominion and control over them. Separate from any possession of Rimar and Chila, the government also established that the petitioner possessed the goods at a different place and at a later time on April 17, 1974, when he received and stored the goods at OEM.

In *Stirone,* this Court held that the possibility that defendant had been convicted of a charge not found by the grand jury required reversal. In rejecting petitioner's contention, the court of appeals failed to consider the substantial probability that the petitioner in the present case was also held to answer not on the charge returned by the grand jury but on another different charge. In ignoring this probability, the court of appeals decided a federal question in a way which conflicts with the decision of this Court in *Ex parte Bain,* 121 U.S. 1 (1886) and *Stirone* v. *United States,* 361 U.S. 212 (1960). Petitioner therefore respectfully requests that this Court grant the present petition for a writ of certiorari.

**IN SUMMARILY DISMISSING PETITIONER'S ARGUMENT THAT HE CONSENTED TO THE SEARCH OF HIS BUSINESS PREMISES ONLY AS A RESULT OF COERCION AND DURESS, THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS NOT ONLY WITH THE APPLICABLE DECISIONS OF THIS COURT BUT ALSO WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.**

In *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 227 (1973), this Court recognized that: "Whether the 'consent' to a

search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Considering facts similar to those in the present case, this Court in *Amos* v. *United States,* 255 U.S. 313 (1921), found that law enforcement officials had implicitly coerced consent to their search of defendant's home, thereby violating his right under the fourth amendment to be free of unreasonable searches and seizures. In numerous decisions the courts of appeals, including the Court of Appeals for the Sixth Circuit, have inferred coercion of consent in circumstances similar to those surrounding petitioner's consent in the present case. *See, e.g., Kirvelatis* v. *Gray,* 513 F.2d 213 (6th Cir. 1975); *Higgins* v. *United States,* 209 F.2d 819 (D.C. Cir. 1954); *Judd* v. *United States,* 190 F.2d 649 (D.C. Cir. 1951). In the present case the court of appeals dismissed as without merit, petitioner's contention that the FBI agents coerced his consent to their search of his business premises, thereby violating petitioner's right under the fourth amendment to be free of unreasonable search and seizure. In thus summarily dismissing petitioner's claim, the Sixth Circuit has decided a federal question in a way which conflicts not only with the applicable decisions of this Court but also with numerous decisions of other courts of appeals on this same matter.

In *Amos* v. *United States,* 255 U.S. 313 (1921), two deputy collectors of the Internal Revenue Service arrived at the defendant's home in his absence. The agents identified themselves to the defendant's wife, stating that they had come to search the premises for violations of the revenue law. Although the agents possessed neither arrest nor search warrants, the woman nevertheless permitted them to search the premises, where they found illicitly



distilled whiskey. Under these circumstances this Court found no consent, noting that: "it is perfectly clear that under the implied coercion here presented, no . . . waiver was intended or effected." 255 U.S. at 316.

The courts of appeals have also inferred coercion in circumstances similar to those found in the present case. In *Judd* v. *United States,* 190 F.2d 649, 651 (D.C. Cir. 1951), the Court of Appeals for the District of Columbia noted that:

> Thus, "invitations" to enter one's house extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. . . . Intimidation and duress are almost necessarily implicit in such situations.

In *Higgins* v. *United States,* 209 F.2d 819 (D.C. Cir. 1954), a policeman searching defendant's room had found and seized marijuana. The arresting officer testified that he had identified himself and asked the defendant if he could talk to him, the defendant responding "all right." The officer testified that although he had been informed that the defendant was in possession of narcotics, the defendant denied possession of any narcotics. The defendant nevertheless acquiesced when the officer requested permission to "look around." An the basis of this testimony, the court concluded that the prosecution had not established consent.

> [N]o sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room and find contraband in it, the occupant's words, or signs of acquiescence in the search accompanied by denial of guilt, do not show consent.

209 F.2d at 820.

Finally, in *Kirvelatis* v. *Gray*, 513 F.2d 213 (6th Cir. 1975), the Court of Appeals for the Sixth Circuit found no consent where police officers, investigating a shooting death, had entered defendant's apartment with their guns drawn, and, advising defendant of his rights, requested his permission to search. Although defendant had acquiesced, the court found that: "[T]he overpowering armed police presence requires additional evidence that the choice was uncoerced beyond appellant's mere assent to the search to permit a finding of voluntariness." 513 F.2d at 215 n.1.

In the present case, four armed agents of the Federal Bureau of Investigation sought, and obtained, petitioner's consent to their search of his business premises. Despite petitioner's denials, the agents repeatedly insisted that he had bought stolen compressors from Dale Rimar. Although the agents, along with a United States attorney, had determined that the government could not demonstrate the probable cause requisite to the issuance of a search warrant, the agents nevertheless informed petitioner that if he did not consent to the search, they would obtain a search warrant and return. They also repeatedly informed petitioner in a threatening way that they would advise the United States attorney should petitioner fail to co-operate. After a substantial period of time, perhaps as much as an hour after the agents first entered OEM, petitioner, at their insistence permitted the agents to search the premises.

This Court in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973), held that:



> [The fourth amendment] requires that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

The facts in the present case establish that petitioner consented to the search of OEM not freely and voluntarily, but as a result of coercion. In summarily dismissing petitioner's claim, the Court of Appeals for the Sixth Circuit has decided a federal question in a way which conflicts not only with the applicable decisions of this Court but also with the decisions of other courts of appeals on this same matter. Petitioner therefore respectfully requests that this Court grant the present petition for a writ of certiorari.

## CONCLUSION

The Court of Appeals for the Sixth Circuit has sanctioned a proceeding in the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals has decided two federal questions, that is, whether the prosecution impermissibly amended the indictment in the course of the trial and whether law enforcement officials coerced petitioner's consent to their search of his premises, in a way which conflicts with the applicable decisions of this Court.

Finally, the court of appeals has rendered a decision which conflicts on two points, the definition of interstate commerce for purposes of 18 U.S.C. § 659 and the coercion of petitioner's consent to the search of his premises, with the decisions of other courts of appeals on these same matters.

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

RALPH E. BROWN
104 South Michigan
Chicago, Illinois 60603
*Attorney for Petitioner*
DAVID L. SCHURGIN



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. .....

DAVID L. SCHURGIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**CERTIFICATE OF SERVICE**

I, RALPH E. BROWN, a member of the bar of the Supreme Court of the United States, and counsel for the petitioner, hereby certify that I have this Nov. 28, 1977, served three copies of the foregoing Petition for Writ of Certiorari upon the Solicitor General of the United States, Department of Justice, Room 5614, Washington, D.C. 20530, and upon James K. Robinson, United States Attorney, United States Courthouse, Detroit, Michigan 48226, by depositing same, first class postage prepaid, in the United States mail box at 104 South Michigan Avenue, Chicago, Illinois. All parties required to be served have been served.

RALPH E. BROWN

## APPENDIX A

Nos. 76-2327, 76-2328, 76-2329

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*vs.*

STANLEY RIMAR, DAVID L. SCHURGIN, RUSSELL P. BARBER,
*Defendants-Appellants.*

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed July 27, 1977.

Before: EDWARDS and PECK, Circuit Judges and SILER,* District Judge.

PECK, Circuit Judge. These defendants appeal their convictions under a two-count indictment for stealing and aiding and abetting in the theft of goods from interstate commerce, and for possession of goods knowing them to have been stolen from interstate commerce. The trial judge first determined that *Bruton* v. *United States*, 391 U.S. 123 (1968) required the severance of certain defendants. Thereafter, at a single trial, he sat as the trier of fact as to the defendants Barber and Schurgin who had waived jury trial, and empanelled two juries to hear the cases of defendants Rimar and Chila. Defendant-appellant Rimar was jury convicted on both counts of the indictment, but was sentenced to six years on the theft count only since the judge dismissed the possession count

*Honorable Eugene E. Siler, Jr., United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

pursuant to this court's opinion in *United States* v. *Solimine*, 536 F.2d 703 (6th Cir. 1976). Defendant-appellant Schurgin was found guilty by the trial judge of the possession count and sentenced to 18 months. Defendant-appellant Barber was found guilty of aiding and abetting in the theft and was sentenced to one year, all but 60 days suspended. Co-defendant Chila was acquitted by a jury of both counts. Co-defendant Lloyd Witherite pled guilty, received a two-year sentence under a Rule 11 plea bargain, and testified against the others at trial.

Evidence adduced at trial tended to establish the following. On April 16, 1974, Ernest Williams, a truck driver for the Shippers Dispatch Company, drove a Shippers Dispatch trailer, which originated in Chicago, Illinois, from a freight yard in Detroit, Michigan, to the Ford Assembly Plant in Dearborn, Michigan. Upon turning over the "pro bill," a document showing the contents of the trailer to be 18 pallets of 2880 air compressors, to the Ford receiving clerk, Williams was told that the compressors could not be unloaded at that time. He was asked to take the trailer and leave it in a parking area, known as the bull pen. Usual procedure at this point would be for a switcher (a driver representing an independent trucking firm and working within the Ford complex) to hook a tractor to the trailer and take it to the loading dock when Ford was ready to unload it.

Lloyd Witherite was working as a switcher at the Ford plant on April 16, 1974. He had a prior agreement with appellant Rimar, that Rimar would buy certain automobile parts that Witherite would steal. While checking through the freight bills that day, Witherite noticed the bill listing 18 pallets, 2880 air compressors. Witherite took the bill and subsequently telephoned Rimar, who agreed to buy the air compressors for the previously agreed upon price of $5.00 apiece (retail value was $26.18 each). Witherite also had an on-going agreement with appellant Barber, a security man at the plant gate, under which Barber would "look the other way" for a price.



Witherite waited until Barber was on duty at the outgoing gate, then he hitched his tractor to the Shippers Dispatch trailer containing the air compressors, and drove to the outgoing gate. He warned Barber not to look too closely and Barber opened the door of the trailer slightly, then closed it quickly and allowed Witherite through. Witherite drove out of the Ford complex, parked the trailer at another Ford lot located outside the gate, and called Rimar to tell him where he could pick it up. Later that night Witherite met Rimar, who paid him $14,400.00 in cash for the air compressors. Witherite paid Barber $200.00 on the following day for his part in the theft.

In the early morning hours of April 17, Rimar appeared at the dock of Howard Metal and Salvage, Inc., and asked Fred Howard, the owner, to assist him in unloading the contents of a trailer and reloading those contents into another trailer. John Chila, Rimar's driver, then delivered this load to the Original Equipment Manufacturers (O.E.M.), owned by appellant Schurgin. Schurgin had, a day or two before, told his warehouse manager, Larry Zbizek, to expect a large shipment of air compressors. After arrival of the parts on April 17, the compressors were unloaded and moved into the warehouse, even though no paperwork accompanied the shipment. In accordance with the instructions of Schurgin, O.E.M. employees repackaged the compressors, removing the serial plates as they did so.

On May 14, four FBI agents, acting pursuant to information given to them by Chila, proceeded to the O.E.M. Company where they identified themselves and questioned Schurgin regarding the stolen compressors. Schurgin denied they were on the premises. The agents requested permission to search; Schurgin indicated he wanted to talk to his attorney, which he did by telephone. Schurgin returned and subsequently signed the consent to search form. The search was halted at one point, when Schurgin again indicated he wished to confer with his attorney, and

did not resume until Schurgin's attorney arrived at the O.E.M. premises. The search produced 440 compressors and several serial plates matching those of the stolen goods. It was later determined that the remainder of the compressors had been sold by Schurgin to the Essex International Corporation, and were recovered therefrom.

Appellants present a number of issues, jointly and individually. The primary concern of this court after receiving the briefs and oral arguments of the parties, was whether the unusual procedure implemented in the district court of simultaneous prosecutions before two juries and the judge created an atmosphere so confusing as to deprive these appellants of a fair trial. A thorough review of the record has revealed certain instances of confusion, some cited by the appellants, some not. Several of such instances were reflected by misstatements of the judge or defense counsel in referring to the attorneys or their clients by the wrong names, or confusing momentarily which jury was sitting in which case. Many of these confusing moments took place out of the presence of the juries. However, nowhere in the record do we find any continuing confusion, so pervasive as to render the trial unfair. The trial judge seemed very much aware of the potential for error inherent in the procedure and he moved cautiously in areas where the rights of particular defendants were or could have been involved. Hence the trial took somewhat longer than the nature of the charges might suggest was necessary. In instances where misstatements occurred, the district judge promptly corrected himself or the attorney involved and instructed the jury accordingly. As the Supreme Court has held: "A defendant is entitled to a fair trial but not a perfect one. . . . It is not unreasonable to conclude that in many cases the jury can and will follow the trial judge's instructions to disregard such [improperly submitted] information." *Bruton* v. *United States, supra,* 228 F.2d at 135. [sic]



Additionally, we conclude that the district court's instructions to the jury as to the interstate commerce element of the crimes in question correctly stated the law of this circuit as formulated in *Winer* v. *United States,* 288 F.2d 944 (6th Cir. 1956), and reiterated in *United States* v. *Yoppolo,* 435 F.2d 625 (6th Cir. 1970). We further conclude that the district court's action in dismissing the possession count as to defendant Rimar, and sentencing him solely upon the theft count, complied with this court's decision in *United States* v. *Solimine,* 536 F.2d 703 (6th Cir. 1976). The remaining contentions of the appellants we conclude to be without merit.

The judgments of the district court are affirmed.

## APPENDIX B

The United States District Court for the Eastern District of Michigan, Southern Division, published no opinion. The Honorable James P. Churchill, judge presiding, delivered the following findings of fact and conclusions of law from the bench.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

74-82717

UNITED STATES OF AMERICA,

*Plaintiff,*

*vs.*

DAVID SCHURGIN, STANLEY RIMAR, a/k/a Dale Rimar, JOHN JAMES CHILA, RUSSELL P. BARBER,

*Defendants.*

Excerpt from Proceedings had in the above-entitled matter before Honorable James P. Churchill, United States District Judge, as to non-jury trial of Defendant David Schurgin.

SESSION OF FRIDAY, JUNE 11, 1976

Pages 1223-1229

The Court: Mr. Fink referred in his argument to the more important decisions in one's life. I will tell you the most important and most difficult decision in a trial judge's life is a decision in a non-jury trial on a circumstantial evidence case.



I don't want to prolong the agony and say too much and under the Court Rule I am not required to find facts specially but I think the parties, both government and defendant, deserve it and not only that it makes the Court's reasoning more testable in the event of a conviction. Furthermore, I say this because it has happened, I have made favorable decisions to defendants in the course of making special fact findings even though the decision was to the contrary in the first place and, I don't believe, I think I should state my reasons for the decision the Court must make. The first thing, a storage facility: the interstate commerce aspect of it. There doesn't seem to be any real dispute—as far as the Court is concerned the government has not proved that Ford did not know the goods were on the premises. What does Ford know? It's a big company. If that were the controlling issue the decision would have to go against the government on that point.

The truck came through the gate, checked in through the gate. They have not proved it didn't happen and I am satisfied that it did happen. The truck driver brought the goods up. He got a pass. He brought the truck someplace, parked it temporarily, came up to a window or office, handed in some papers. I am satisfied there was somebody there. They weren't entered, the shift change, time, accident, plan, scheme, who knows. They were not entered on the books, on paper. The shipping clerk or whoever he was said, "We can't unload these things now. Go park it over here in the storage area." There isn't any fact question about it.

It was an arrangement—these are fact questions but I am satisfied they occurred and I am making findings of fact they occurred. They made the arrangement with Shippers Dispatch—Shippers Dispatch had an arrange-

ment with another trucking company for their convenience to move the goods up to the unloading dock to be unloaded. The fact that Ford had something to do with the selection of this other company, the fact that Shippers Dispatch, if they wanted to do business probably had to go along is irrelevant. I think that any way you twist it, no matter how persistent and my goodness, the arguments have been persistent, there isn't any possible way consistent with the undisputed facts that these goods were not still in interstate commerce under the law and within the meaning of the statute.

I think the government probably could have charged this case as being on a vehicle as well as being in a storage facility or charged in the alternative, it wouldn't make any difference. My reading of the statute is that Congress intended it to be rather all inclusive and while the goods were sitting on a trailer without being attached to a truck waiting to be unloaded, they were within the broad meaning of the word of a storage facility.

I have no problem whatsoever in saying that the government established by the undisputed evidence that these goods were in interstate commerce, they had not lost their interstate commerce capacity and were taken and carried away from a storage facility while they were still in interstate commerce.

What about Mr. Barber's participation? It's about as clear a case of aiding and abetting as you ever heard of and/or ever seen. There was no way they could get these goods outside the perimeter, effectively get them outside the perimeter without the corruption of a Ford employee.

The fact he is a Ford employee doesn't mean they are not in interstate commerce. That was part of the physical structure there. They were still in interstate commerce



when they came through the gate. They would have been in interstate commerce until they were backed up to that dock to unload. The fact that other people were far more involved in the sense of making more money doesn't change the fact that Mr. Barber turned his head. He had done it as a matter of course in the past, he turned his head the other way. It is no different than somebody unlocking a window to allow somebody else to break and enter or a guard to look the other way while a robbery is occurring.

Mr. Barber allowed himself to be corrupted in a way that he was indeed an aider and abettor of this interstate theft from a storage facility and it's the Court's decision that Mr. Barber stands convicted thereof.

As far as Schurgin is concerned—as far as Barber is concerned, that is the only charge against him. There is no charge of possession. He never was in possession, he merely aided and abetted in the theft and carrying away of the goods in interstate commerce.

As far as Mr. Schurgin is concerned, it's kind of a classic case of circumstantial evidence. Two or three things I think must always be remembered. The government has a nice instruction they ask courts to give and courts generally give it, the fact one cannot fathom or scrutinize the human mind or fathom what goes on in the human mind doesn't mean they don't have to prove with the same certainty that element the same as every other element.

I said and I feel sorry for Mr. Schurgin and his family and everybody else just like Mr. Barber but I am satisfied Mr. Schurgin did in fact know that these goods were stolen. There is just overwhelming circumstantial evidence. No one thing perhaps would do it. The large number of

serial tags, it isn't the removal of the serial numbers, it's even acquiring them. There is no satisfactory explanation of how such a large quantity of these air compressors with serial plates on them, Ford serial plates, could have been received.

He was in possession soon after they were stolen. Certainly the government has not proven whether he dealt directly with Rimar in the first place or whether he dealt only with the other man, the point is he was in possession soon after they were stolen. He received them without any paperwork. It's odd to say the least.

He did know they were coming in advance. He did arrange to have the tags removed quickly. He did want to have the tags removed. He did a sloppy job of it but he nonetheless wanted to have his employees get rid of those plates. He did pay the seller with some of his own money in the most odd circumstances. He did indeed, when he learned that the FBI was coming or somebody was coming, attempt to, he made kind of a futile attempt but he did make an attempt to hide the goods.

There is no other explanation of the fact that he wanted them up on his shelf where people with less experience in the business than he thought they would be too dangerous to put other than the fact he was attempting to hide them. He did in fact attempt to deceive the FBI when they came in in a number of little ways and while there is a theory of circumstantial evidence that is consistent with innocence, it is not, in my view, a reasonable theory against this overwhelming weight of circumstantial evidence and I am satisfied that from the beginning Mr. Schurgin knew these were stolen.



He may not have known who stole them or how they were stolen. I would not convict him on that short period of time following what he says was the last couple of days of this offense even though there might be an argument for technical guilt if I were not satisfied with good conscience in my own mind to a moral certainty that he knew all along that he was dealing in stolen goods.

Why he did it I don't know. Why people commit crimes, I don't know. We may never know but that is the judgment of the Court. I therefore find Mr. Schurgin guilty on two counts.

## APPENDIX C

18 U.S.C. § 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or
>
> • • •
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.
>
> The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels



> shall have been removed or into which the same shall have been brought by such offender.
>
> To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.
>
> A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-771 and 77-5755

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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DAVID L. SCHURGIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

STANLEY RIMAR, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

DANIEL M. FRIEDMAN,
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BENJAMIN R. CIVILETTI,
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## INDEX


Page

Opinion below ..... 1

Jurisdiction ..... 2

Questions presented ..... 2

Statement ..... 2

Argument ..... 4

Conclusion ..... 12


CITATIONS

Cases:


*Brown* v. *United States*, 411 U.S. 223 ..... 6

*Bruton* v. *United States*, 391 U.S. 123 ..... 4

*Gentry* v. *United States*, 533 F. 2d 998 ..... 11

*Milanovich* v. *United States*, 365 U.S. 551 ..... 11

*O'Kelley* v. *United States*, 116 F. 2d 966 ..... 8

*Osborne* v. *United States*, 351 F. 2d 111 ..... 7

*Proffitt* v. *United States*, 549 F. 2d 910 ..... 11

*Schneckloth* v. *Bustamonte*, 412 U.S. 218 ..... 10

*Stirone* v. *United States*, 361 U.S. 212 ..... 10

*United States* v. *Astolas*, 487 F. 2d 275, certiorari denied, 416 U.S. 955 ..... 7

*United States* v. *Bozza*, 365 F. 2d 206 ..... 6

*United States* v. *Bracken*, 558 F. 2d 544 ..... 11

*United States* v. *Cousins*, 427 F. 2d 382 ..... 8

*United States* v. *Gaddis*, 424 U.S. 544 ..... 11

Page

Cases—continued:

*United States* v. *Gates*, 528 F. 2d 1045, certiorari denied, 429 U.S. 839 ..... 8

*United States* v. *Gilbert*, 553 F. 2d 990 ..... 11

*United States* v. *Lindsay*, 552 F. 2d 263 ..... 11

*United States* v. *Ortiz-Martinez*, 557 F. 2d 214 11

*United States* v. *Sellers*, 547 F. 2d 785, certiorari denied, 429 U.S. 1075 .....11-12

*United States* v. *Solimine*, 536 F. 2d 703, vacated on other grounds, 429 U.S. 990 ..... 11

*United States* v. *Watson*, 423 U.S. 411 ..... 10

*Winer* v. *United States*, 228 F. 2d 944, certiorari denied, 351 U.S. 906 ..... 8

Statute:

18 U.S.C. 659 ..... 2, 3, 7

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-771

DAVID L. SCHURGIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 77-5755

STANLEY RIMAR, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 558 F. 2d 1271.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-771.

## JURISDICTION

The judgment of the court of appeals was entered on July 27, 1977. In No. 77-771 a petition for rehearing was denied on November 4, 1977, and the petition for a writ of certiorari was filed on November 29, 1977. In No. 77-5755 a petition for rehearing was denied on October 27, 1977, and the petition for a writ of certiorari was filed on November 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the simultaneous prosecution of each petitioner and two other defendants in a single proceeding before separate finders of fact was improper.

2. Whether the evidence was sufficient to show that the automobile air compressors that petitioner Schurgin possessed had been stolen from interstate commerce (No. 77-771 only).

3. Whether petitioner Schurgin voluntarily consented to the search of his warehouse (No. 77-771 only).

4. Whether the prosecutor impermissibly amended the indictment (No. 77-771 only).

5. Whether, in the circumstances of this case, petitioner Rimar is entitled to a new trial because he was convicted of both theft and possession of the same property (No. 77-5755 only).

## STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of Michigan, petitioner Schurgin was convicted of possession of goods with knowledge that they had been stolen from interstate commerce, in violation of 18 U.S.C. 659. He was sentenced to 18 months' imprisonment. In the same proceeding,[2] petitioner Rimar was found guilty by a jury of aiding and abetting the theft of goods stolen from interstate commerce, and of possession of goods stolen from interstate commerce, in violation of 18 U.S.C. 659 and 2. He was sentenced to six years' imprisonment.[3]



The evidence is summarized in the opinion of the court of appeals (Pet. App. 2a-4a). On April 16, 1974, a trailer that was loaded in Chicago, Illinois, arrived at the Ford Motor Company's assembly plant in Dearborn, Michigan. The trailer contained automobile air compressors. The trailer was placed in a parking area known as the "bull pen," awaiting delivery to an unloading dock by another tractor driver known as a "switcher," who was employed by an independent trucking firm.

Lloyd Witherite, a "switcher," had an arrangement with Russell Barber, a Ford security guard, to "look the other way" for a price while Witherite stole trailers from the "bull pen." On the night of April 16 Barber permitted Witherite to drive the trailer load of compressors out of the Ford complex. Witherite sold the stolen cargo to petitioner Rimar for $14,400, a price that had been negotiated before Witherite stole the trailer. Early the following morning Rimar transferred the cargo into another trailer, and John Chila delivered the compressors

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[2]Petitioners, together with Russell P. Barber and John James Chila, were tried in the same courtroom at the same time. The judge sat as trier of fact as to petitioner Schurgin and Barber, both of whom had waived jury trial. One jury was empanelled to hear the case against petitioner Rimar, and another jury heard the case against Chila. Chila was acquitted. Barber's conviction was affirmed, and this Court denied certiorari on December 5, 1977 (No. 77-312).

[3]The district court dismissed the possession count after the jury verdict.

to petitioner Schurgin at the warehouse of Schurgin's company, Original Equipment Manufacturers (O.E.M.) Employees of O.E.M. removed the identification plates, repackaged the compressors, and shipped some of them to another company.

On May 14, 1974, FBI agents searched the O.E.M. warehouse and found approximately 440 air compressors and several serial plates matching those of the stolen goods. The remaining compressors were later recovered from the company that had purchased them from petitioner Schurgin.

## ARGUMENT

1. Prior to trial the district court concluded that *Bruton* v. *United States*, 391 U.S. 123, required that certain of the four defendants be tried separately. Because most of the prosecution's evidence would be admissible against all defendants, and because much of each defendant's evidence could be presented with the other defendants present, the court concluded that, in the interest of judicial economy, all defendants would be tried at the same time but before separate factfinders. The trial judge sat as trier of fact concerning Barber and petitioner Schurgin, while separate juries heard the evidence concerning Chila and petitioner Rimar.

Both petitioners contend that this procedure violated the principles of *Bruton*. Neither petitioner, however, objected to this procedure either before or during trial; the objection now comes too late. In any event, there was no error here.

a. Petitioner Schurgin contends (Pet. No. 77-771, pp. 7-9) that he was denied a fair trial because of the confusion necessarily engendered by the trial court's decision to conduct four separate trials simultaneously.



Although petitioner points to no specific incident of confusion, the court of appeals acknowledged (Pet. App. 4a) that several times during the course of proceedings the trial judge incorrectly identified the defense attorneys, referred to their clients by the wrong name, or showed some momentary confusion about which jury was sitting in which case. As the court of appeals observed, however, most of these incidents took place outside the presence of the juries (*ibid.*). The "confusion" was no more than naturally occurs in multi-defendant trials, and it was not caused or enhanced by the use of multiple juries. Furthermore, when misstatements did occur, the court promptly corrected itself or the attorney involved and instructed the jury accordingly.

The court of appeals recognized that the district court was "very much aware of the potential for error inherent in the procedure and * * * moved cautiously in areas where the rights of particular defendants were or could have been involved" (*ibid.*). The court of appeals thoroughly reviewed the record, concluding that while the procedure here was "unusual" (*ibid.*), it did not result in "any continuing confusion so pervasive as to render the trial unfair" (*ibid.*).[4]

b. Petitioner Rimar fares no better in his argument that he was prejudiced by references to statements made by Barber and Chila. He concedes (Pet. No. 77-5755, p. 8) that the statements were not introduced against him. Moreover, with respect to the prosecutor's comment

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[4]The juries rendered discriminating verdicts, finding Rimar guilty on both counts of the indictment while acquitting Chila (Pet. App. 1a-2a).

concerning Barber's statement,[5] petitioner Rimar concedes (*id.* at 9) that "the Court sustained [his] objection * * * and further instructed the jury that it was not relevant and did not corroborate [any evidence] against [petitioner]." That being so, the prosecutor did not use against Rimar any material not subject to effective cross-examination in the statement of a non-testifying co-defendant. In any event, because Witherite's testimony against Rimar was corroborated by credible evidence (*e.g.*, Rimar Tr. 589-593), the prosecutor's reference to Barber's allegedly corroborative statement—even if the reference amounted to the use of the statement—told the jury nothing it did not already know and was harmless. See *Brown* v. *United States*, 411 U.S. 223, 231-232.

The prosecutor's reference to Chila's statement about the location of the compressors, and a defense counsel's characterization of Chila as an admitted accomplice (see Pet. No. 77-5755, pp. 9-10), were no more prejudicial. Petitioner admits (*id.* at 6) that the court gave cautionary instructions in both instances and, as the court of appeals stated (Pet. App. 4a), quoting from *Bruton* v. *United States, supra*, 391 U.S. at 135, "[i]t is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such [improperly submitted] information."[6]

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[5]During a discussion in the presence of Rimar's jury about the admissibility of Barber's statement, the prosecutor argued that Barber's statement would corroborate Witherite's testimony (Rimar Tr. 432).

[6]*United States* v. *Bozza*, 365 F. 2d 206 (C.A. 2), on which Rimar relies, is distinguishable. In *Bozza* a defendant's confession that was introduced into evidence corroborated an accomplice's testimony for the government and had the practical effect of directly implicating the co-defendants in the crimes charged. *Id.* at 214-215. Moreover, there was great doubt that the jury heeded the judge's instructions to consider the confession only against the defendant who had made it. *Id.* at 215. Here, by contrast, the references to other statements were fleeting and the court's correction was immediate.



Petitioner Rimar's further argument (Pet. No. 77-5755, pp. 11-12) that a transcript of Barber's and Chila's statements was improperly included among exhibits given to the jury is insubstantial. That error was discovered and corrected approximately five minutes after the jury had received the exhibits (*id.* at 11). A hearing revealed that none of the jurors had read any of the incriminating statements, and petitioner's counsel withdrew his request for a mistrial (Rimar Tr. 1085-1090). Petitioner Rimar was not affected by submission to the jury of the unauthorized material.[7]

2. Petitioner Schurgin contends that the trailer load of compressors was not in interstate commerce when it was stolen, and thus that the theft was not within the reach of 18 U.S.C. 659. He argues that the shipment lost its interstate character when it was left in the "bull pen" (Pet. No. 77-771, p. 10). This contention is incorrect.[8]

The determination whether a shipment is in interstate commerce for the purposes of 18 U.S.C. 659 is "essentially a practical one based on common sense." *United States* v. *Astolas*, 487 F. 2d 275, 279 (C.A. 2), certiorari denied, 416 U.S. 955. It "depend[s] upon the relationship between the

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[7]Petitioner Rimar's reliance on *Osborne* v. *United States*, 351 F. 2d 111 (C.A. 8), is unwarranted. In *Osborne*, "a close and a difficult" case, highly prejudicial material was improperly submitted to the jury and was "likely" examined by the jurors during their "long deliberation" over two working days. 351 F. 2d at 118, 119. That case bears no resemblance to this.

[8]Barber raised this issue in his petition for certiorari, which the Court denied. See note 2, *supra*.

consignee, the consignor, and carrier, the indicia of interstate commerce at the time the theft occurs, and the preservation of the congressional intent." *United States* v. *Gates*, 528 F. 2d 1045, 1047 (C.A. 5), certiorari denied, 429 U.S. 839. Contrary to petitioner's assertion, Ford had not "accepted and assumed dominion and control over the goods prior to the time of the alleged theft" (Pet. 13). According to testimony by Ford employees and carrier representatives, although the goods had been brought to Ford Motor Company property, Ford had not accepted the shipment nor had any attempt been made to unload the goods. Under the procedure followed at the Ford plant, delivery would not have been completed at least until the trailer was taken by a "switcher" to an unloading dock and the cargo removed (Barber Tr. 11, 15, 24-30; Rimar Tr. 25-29, 32-33; H. 151, 157).[9] See *Winer* v. *United States*, 228 F. 2d 944, 947-948 (C.A. 6), certiorari denied, 351 U.S. 906; *United States* v. *Cousins*, 427 F. 2d 382, 384-385 (C.A. 9). Accordingly, as the district court concluded (Pet. App. 8a), the "undisputed evidence" established that the stolen shipment retained its interstate character.[10]

3. The search at the O.E.M. warehouse resulted in the discovery and seizure of 440 of the stolen automobile compressors. Petitioner Schurgin argues that he did not voluntarily consent to this search. This contention is refuted by the record.

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[9]"H." refers to the transcript of the suppression hearing.

[10]There is no conflict among the circuits concerning the proper application of the statute. *United States* v. *Cousins*, *supra*, and *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8), cited by petitioner, recognize that the determination of the interstate character of a shipment turns on the particular facts and circumstances of each case.



A hearing was held before trial on Schurgin's motion to suppress the evidence seized at the warehouse. According to an FBI agent who participated in the search, he and three other agents, acting pursuant to information supplied by Chila, went to the O.E.M. Company on May 14, 1974. After identifying themselves, they told Schurgin that they had reason to believe that the stolen air compressors were on the premises (H. 3). When the agents asked if they could look through the plant for the compressors, petitioner readily gave his permission and led the agents on a tour of the premises (H. 21). While in the warehouse, one of the agents saw two crates that matched the description of those containing the stolen compressors (H. 22).

After the brief tour, Schurgin said that he wanted to talk to an attorney. Following a phone call to his attorney, Schurgin told the agents that he would agree to a search of the premises. He then signed a "consent to search" form; no threats were made to induce him to sign the form (H. 23-26).[11] Petitioner testified that he read and signed the consent form (H. 55-56).

After the form was signed, the agents began to search the warehouse and found one of the stolen air compressors. When Schurgin was informed of this, he stated that he desired to confer with his attorney again (H. 28). Following a telephone conversation, petitioner told the agents that his attorney was coming to the O.E.M. warehouse; the agents stopped the search and waited for

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[11]Before petitioner signed the consent form, he requested that the agents strike from the form a phrase that would have allowed the seizure of "letters and papers". The agents complied with the request and petitioner signed the form (H. 25).

petitioner's attorney to arrive (*ibid.*). The attorney told the agents to "[g]o ahead and continue the search." The agents then discovered 439 other stolen air compressors (H. 29).

This record shows that petitioner freely and voluntarily consented to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 233; *United States* v. *Watson*, 423 U.S. 411, 424.

4. Petitioner Schurgin's additional claim (Pet. No. 77-771, pp. 13, 17) that the prosecutor impermissibly "amended" the indictment by adducing proof at trial that varied significantly from the allegations of the indictment is unpersuasive. Count II of the indictment charged both petitioners and Chila with possession of the air compressors on April 17, 1974, with knowledge that they were stolen (Pet. No. 77-771, p. 15). The evidence adduced at trial showed that on April 17 Rimar transferred the cargo into a trailer and delivered the compressors to Schurgin's warehouse where, pursuant to Schurgin's instructions, the goods were unloaded and the serial plates removed. Thus there was no variance between the indictment and the proof at trial and no danger that petitioner was convicted of a charge not found by the grand jury. Cf. *Stirone* v. *United States*, 361 U.S. 212, 219.

5. Petitioner Rimar was found guilty of both theft and possession of the stolen merchandise. The district court entered a sentence only on the theft count. Petitioner contends (Pet. No. 77-5755, pp. 13-15) that, because the theft and possession counts went to the jury without an instruction that he could not be convicted on both, he is entitled to a new trial on the theft count. The court of appeals held (Pet. App. 5a) that, in the circumstances of this case, dismissal of the possession count was the appropriate remedy. There is no reason to review that ruling.



In *United States* v. *Gaddis*, 424 U.S. 544, this Court held that dismissal of the possession count usually would suffice to correct an erroneous submission on both counts. *Gaddis*, like this case, was one in which the defendants committed a continuous series of acts involving both theft and retention of the booty.[12] Although here, unlike the case in *Gaddis*, there was some evidence of possession, there is no reason to believe that the jury that convicted petitioner of both charges would have acquitted him of the theft had it been told that it could convict him of either the theft or possession but not both. The proper response to a finding of guilt on both counts therefore was to enter a conviction on the theft count alone.

The courts of appeals that have considered the problem since *Gaddis* have held that, in all but extraordinary circumstances, the failure to instruct the jury to elect between offenses may be cured by vacating the conviction for the lesser of the offenses. See, *e.g.*, *United States* v. *Bracken*, 558 F. 2d 544 (C.A. 9); *United States* v. *Ortiz-Martinez*, 557 F. 2d 214 (C.A. 9); *United States* v. *Gilbert*, 553 F. 2d 990 (C.A. 5); *United States* v. *Lindsay*, 552 F. 2d 263 (C.A. 8); *Proffitt* v. *United States*, 549 F. 2d 910 (C.A. 4); *United States* v. *Solimine*, 536 F. 2d 703 (C.A. 6), vacated on other grounds, 429 U.S. 990; *Gentry* v. *United States*, 533 F. 2d 998 (C.A. 6); *United States* v.

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[12] *Gaddis* distinguished *Milanovich* v. *United States*, 365 U.S. 551, where the defendant was convicted of both stealing and receiving stolen property, in light of its "very unusual facts." 424 U.S. at 548. Seventeen days had elapsed between the theft and the first time the defendant received any of the proceeds; the evidence showed that the defendants had committed separate crimes. In the present case Rimar participated in a continuous operation.

*Sellers*, 547 F. 2d 785 (C.A. 4), certiorari denied, 429 U.S. 1075. There is no reason for the Court to review the decision here, which is supported by this consensus.

**CONCLUSION**

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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*The Solicitor General is disqualified in this case.

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Supreme Court, U. S.
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No. 77-771

In the
# Supreme Court of the United States
October Term, 1977

DAVID L. SCHURGIN,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY OF THE PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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**REPLY OF THE PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI**

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Pursuant to rule 24 of the Rules of Practice of the Supreme Court of the United States, petitioner David L. Schurgin submits this brief in reply to the brief in opposition of the Solicitor General.

In his brief in opposition the Solicitor General misstates both the argument of the petitioner and the specific content of his petition. In its brief in opposition the government states that, "[P]etitioner [Schurgin] points to no specific incident of confusion," (Brief in Opposition, p. 5) an obviously erroneous statement in view of the fact that petitioner in the first full paragraph on page nine states, "Thus, the opinion of the court of appeals perpetuates the confusion of the district court, confusion

which culminated in the judgment of the district court, for on June 11, 1976, that court found the petitioner, who had been tried only on one count, guilty on two counts, a finding possible only if the court considered testimony not properly admitted into evidence in petitioner's trial." More importantly, however, the Solicitor General fails to address petitioner's argument concerning confusion at trial. Following the opinion of the court of appeals, the Solicitor General states: "[S]everal times during the course of the proceedings the trial judge incorrectly identified the defense attorneys, referred to their clients by the wrong name, or showed some momentary confusion about which jury was sitting in which case. As the court of appeals observed, however, most of these incidents took place outside the presence of the juries"; "[I]t [the confusion] was not caused or enhanced by the use of multiple juries"; and "Furthermore, when misstatements did occur, the court promptly corrected itself or the attorney involved and instructed the jury according." Brief in Opposition, p. 5. These observations address a particular inquiry, that is, does review of the circumstances require as its logical conclusion, a finding that the proceeding must necessarily have resulted in confusion on the part of the juries. These observations are inapposite to the inquiry in the present case, that is, whether the joint prosecution of four separate trials, two before juries and two before the bench resulted in such overwhelming confusion on the part of the district court, the trier of fact in petitioner's case, that the proceeding ended by denying petitioner due process of law.

In the present case, the general question of confusion at trial subsumes two more particular propositions: first, whether review of the record reveals such pervasive and



continuing confusion as to require the reviewing court to conclude that the proceedings resulted in confusion on the part of the juries and second, whether the actual evidence in the record of confusion on the part of the district court coupled with the fact that the court heard not two but four trials simultaneously, compels the conclusion that the proceeding resulted in confusion on the part of the court itself. Following the decision of the court of appeals, the Solicitor General responds not to the second proposition, the relevant issue in petitioner's case, but to the first proposition. Thus, although purporting to respond, the Solicitor General in fact fails to address the issue in question, that is, whether the overwhelming confusion which resulted from the attempt to conduct the four separate trials of the petitioner and his three co-defendants simultaneously resulted in such overwhelming confusion on the part of the district court, the trier of fact in petitioner's case, as to make the fair and impartial trial of the charge against petitioner impossible, thereby depriving him of due process of law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, RALPH E. BROWN, a member of the bar of the Supreme Court of the United States, and counsel for the petitioner, hereby certify that I have this February 24, 1978, served three copies of the foregoing Reply of the Petitioner upon the Solicitor General of the United States, Department of Justice, Room 5614, Washington, D.C. 20530, and upon James K. Robinson, United States Attorney, United States Courthouse, Detroit, Michigan 48226, by depositing same, first class postage prepaid, in the United States mail box at 104 South Michigan Avenue, Chicago, Illinois. All parties required to be served have been served.

/s/ Ralph E. Brown